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Supreme Court, U.S.
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No. 08-222

IN THE

Supreme Court of the United States

WHITE LION VAN LINES, INC., A FLORIDA CORPORATION, GREG FISCHER, PETITIONERS

v.

PALM BEACH COUNTY, FLORIDA, A CHARTER COUNTY AND POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, PALM BEACH COUNTY BOARD OF COMMISSIONERS, the GOVERNING BODY OF THE COUNTY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER MUNICIPAL LIABILITY UNDER *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 1018, 56 L.Ed.2d 611 (1978), WILL LIE WHEN THE MOVING FORCE BEHIND THE CONSTITUTIONAL VIOLATIONS PROVEN AT TRIAL WAS THE ENFORCEMENT OF A REGULATORY ORDINANCE BY THE REGULATING AGENCY IN A MANNER AND THROUGH MEANS CONSISTENT WITH THE POLICIES ESTABLISHED BY THE FINAL POLICYMAKERS.

II. WHETHER THE PLAINTIFFS' SEVENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE DISTRICT COURT ISSUED JUDGMENT NOTWITHSTANDING THE FAVORABLE VERDICT AS A MATTER OF LAW BASED ON GROUNDS NOT LITIGATED AT TRIAL, AND WHEN THAT JUDGMENT WAS AFFIRMED BY THE COURT OF APPEALS ON YET ANOTHER GROUND NOT RAISED BY THE PARTIES AT TRIAL.

RULE 29.6

Petitioner, pursuant to Rule 29.6, states that it is a privately held company. There is no publically held corporation that owns more than 10% of its stock.

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INTRODUCTION

Petitioners, WHITE LION VAN LINES, INC. (hereinafter "WHITE LION") and GREG FISCHER, hereby petition for Writ of Certiorari from the decision of the United States Court of Appeals for the Eleventh Circuit affirming the entry of Judgment Notwithstanding the Verdict against PALM BEACH COUNTY (hereinafter "COUNTY") entered by the United States District Court for the Southern District of Florida sitting in Fort Lauderdale, which reversed and vacated a $1.5 million award by a duly-constituted jury finding the COUNTY had violated the due process and equal protection rights of WHITE LION and FISCHER in violation of 42 U.S.C., Section 1983.

OPINION BELOW

The Eleventh Circuit issued an unpublished Opinion affirming the District Court's Judgment Notwithstanding the Verdict. A copy of that Opinion is attached as Appendix "1a". A timely Petition for Rehearing or Suggestion for Rehearing En Banc was filed and denied. The Order denying the Petition for Rehearing is attached as Appendix "20a."

JURISDICTION

WHITE LION and FISCHER hereby invoke the jurisdiction of this Court to hear final judgments or decrees issued by a United States Court of Appeals pursuant to 28 U.S.C., Section 1254(1).

RELEVANT PROVISIONS INVOLVED

U.S. Cont. Amend V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

U.S. Cont. Amend XIV

Section 1 . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code, Section 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings fully dressed . . . .

STATEMENT

GREG FISCHER and his brother spent summers during their high school years in Fort Lauderdale, Florida, during the 1980's working for moving companies. Soon after graduating from high school in 1988, they founded WHITE LION VAN LINES, INC., with one rental truck. A local company

whose distinctive WHITE LION logo was prominently displayed on its trailers, WHITE LION expanded its business rapidly over the next six years. In 1994, WHITE LION built a warehouse facility in Boca Raton, Florida, which is in the southern part of Palm Beach County to handle the extra work. WHITE LION was not affiliated with any national van lines. By the end of 1999, WHITE LION was generating $3 million of business per year with approximately 250 moves per month.

While WHITE LION was prospering by providing good service and developing a good reputation, abuses of consumers by other "fly-by-night" independent movers was prompting the County Commissioners of Palm Beach County to take action. Under the direct supervision of then Commissioner Carol Roberts, a Task Force comprising of movers, County governmental officials, and consumer representatives was formed. Dennis Moore, who was the Director of the Division of Consumer Affairs (hereinafter "DCA") for Palm Beach County was given the responsibility for presiding over the day-to-day operations of the Task Force as well as the responsibility for drafting any proposed legislation the Task Force felt would help relieve the pending crisis in the moving industry.

DCA was one of five divisions of the Department of Public Safety. Paul Milelli was the Director of the Department of Public Safety. Milelli was also involved with the Task Force. Assistant County Attorney, Dawn Wynn, was assigned to the Task Force. Commissioner Roberts was the Chairperson, who presided over many of their meetings.

There were five moving companies invited to join the Task Force. All of them were agents of

interstate van lines. WHITE LION was never invited to join the Task Force.

The Revised Moving Ordinance of 2000 (Ordinance No. 2000-010) was passed on February 15, 2000. It represented a dramatic difference from the moving ordinance it replaced. The old ordinance mandated a contract or Disclosure Form which contained language informing consumers of DCA's telephone number so they could call in complaints and make inquiries about respective moving companies. The Revised Ordinance had a different, more aggressive format. The consumer was presented with a Disclosure Form containing large, bold type identifying DCA's telephone number with the direct request to call before hiring the mover in order to ascertain both license status and complaint history. By the COUNTY's own admission, the volume of calls to DCA's telephone number increased twenty-fold after the new Disclosure Form, which every mover was required to use, came into existence.

All contracts had to be in writing and contain all charges. Any additional costs had to be approved by the customer by a written change order.

Under the old ordinance, DCA compliance officers did not have the power to issue citations. This was remedied in the Revised Ordinance. In order to remedy the problem of moving companies who lacked county-issued permits, verifiable addresses and telephone numbers, the Revised Ordinance required the display of this information on the trucks and any advertising.

One of the most common complaints against disreputable movers was the handling of damage claims to cargo. The law limited recovery for damaged or lost items at $ .60 per pound. The Revised Ordinance

required the prominent display of this information on the Disclosure Form with a line for the consumer to initial to acknowledge having read and understood it. Nonetheless, historically, it had been a common cause of consumer discontent when valuable items were damaged and reimbursement at $ .60 per pound resulted in a below-market value recovery. According to Tim Brown, the President of Brown Moving & Storage, Inc., who was on the Task Force, the ubiquitous nature of cargo damage claims was brought up for discussion by the Task Force prior to the Revised Ordinance being passed. Moore assured them that DCA would try to redirect any consumers complaining about cargo damage back to the moving companies for resolution. As subsequent events demonstrated, this policy or custom was applied to Task Force movers, but not non-Task Force movers such as WHITE LION.

Moore's predecessor at DCA had compiled a list of moving companies being targeted for increased enforcement/harassment. Robert Hitt, who was the Operations Manager at DCA verified this. He testified to the special enforcement directed at WHITE LION both before and after the Revised Ordinance.

Moore, Hitt, and Milelli testified that the purpose of the Revised Ordinance was to drive high-complaint, unlicensed and frequent citation receiving moving companies out of business by encouraging consumers not to hire them These objectives were dramatically portrayed in a documentary produced by the COUNTY starring Dennis Moore and Tom Klause of A-1 Moving & Storage, Inc., another Task Force mover. In that documentary, which was broadcast locally, the policy objectives and means of implementing the policy objectives was clearly set

forth. Statistical graphs were displayed showing the increase in complaints filed and citations issued over a period of time followed by a decrease. This decrease was attributed to illegitimate or "bad" movers being driven from Palm Beach County. In this documentary, Moore introduced Klause and his company to viewers urging them to hire him. Moore and Milelli made a presentation in late 2004 to the Board of County Commissioners reporting the success of the policy implemented after the Revised Ordinance was passed in driving "high complaint" and high Ordinance violator movers from Palm Beach County.

1. *Due Process Violations in License Renewal.*

Summer is a mover's busiest season. The license renewals were due every year by July 1st. In both the summers of 2001 and 2002, WHITE LION's license to operate in Palm Beach County was non-renewed/suspended for a considerable period of time: six weeks in 2001 and three weeks in 2002. During those time periods, consumers calling DCA were advised that WHITE LION was not licensed to move them. WHITE LION proved that it experienced a dramatic shortfall in revenue for those two years, which the jury properly concluded resulted from uncharacteristically slow summers.

There was no process enforced at DCA which gave WHITE LION notice and a meaningful opportunity to be heard concerning any action by the COUNTY in non-renewing/suspending its license. In 2001, FISCHER only discovered the problem when customers reported back from their calls to DCA. When he contacted Moore, he was told that because an affidavit submitted by FISCHER's brother had been

notarized by FISCHER, which Moore claimed was improper, their pending application was denied. This was an incorrect statement of Florida law, but FISCHER had no forum to seek review, so he had another notary notarize his brother's signature. When customers continued to call complaining that DCA had informed them that WHITE LION was still unlicensed, he called Moore again to learn that the faxed affidavit had been rejected again without notice or a reasonable opportunity to be heard because DCA required an original affidavit. Before FISCHER could deliver an original affidavit, his company was issued a citation for violating the signage provisions of the Revised Ordinance. FISCHER was surprised because he had heard Moore assure the Task Force movers on February 28, 2001, that these provisions would not be enforced until further reviewed. WHITE LION remained unlicensed until it could comply with this citation. Only when WHITE LION had purchased lettering and installed it on all its trucks would DCA accept the original affidavit and issue WHITE LION its license.

In 2002, FISCHER again learned that WHITE LION's license had not been renewed from consumers reporting back what they were told by DCA. This time he discovered that contrary to what he had been assured by Moore, the signage citation issued the previous summer had been filed with the Clerk after compliance, but under an incorrect name and address. Consequently, WHITE LION had never received notice of any proceedings. Based upon a call from Moore, a Default Judgment was entered by the Clerk of Court. FISCHER had never received any notice from the Court to appear nor did he learn of the entry of a Default Judgment. His attorney had to file a Motion to

Set Aside Default Judgment, which was granted, but the process took three weeks, during which time consumers calling DCA were advised that WHITE LION was not licensed to move in Palm Beach County.

2. *Due Process Violations in the Recording of Complaints.*

The procedure at DCA was to record written complaints against movers onto a computer data base called a Business Information Report (hereinafter "BIR"). When a consumer would call DCA, they would be told about the complaints read to them by a DCA employee off the BIR. It was undisputed that when DCA reported moving companies with a large number of complaints, that would have a negative impact on its ability to get business. Unfortunately, there was no notice nor reasonable opportunity to be heard to challenge the merits of the complaint. The policy of the COUNTY was to record all complaints regardless of merit. The end result was WHITE LION found itself with a relatively large number of complaints on its BIR, almost all of them cargo damage claims which had been settled at $ .60 per pound in compliance with the law. At trial, WHITE LION introduced the proof that these cargo damage claims had been settled and releases signed, yet they still remained on its BIR. Other complaints included the customer of another moving company whose complaint was that the other moving company had charged her more than the estimate she had received from WHITE LION, but which WHITE LION had ultimately declined to perform. WHITE LION had returned her deposit before the complaint, but her complaint nonetheless remained on its BIR. There were two "inquiries" by consumers to DCA

which were listed as complaints on WHITE LION's BIR. There was a complaint about a storage bill which the consumer simply refused to pay and thought he could gain leverage by filing a complaint. One complaint was filed by DCA with a citation for not including the permit number on some advertising. This was a gift bag distributed at a State Fair where the printer admitted to the mistake. Two complaints involved an accusation that WHITE LION had not used the new disclosure form before its effective date and that a written estimate had not been presented on moves that predated the Ordinance's effective date. The upshot was that consumers calling DCA were told from early 2000 until mid-2002 and beyond that WHITE LION had over 25 complaints in its BIR. There was testimony from DCA staff that consumers would frequently hang up in the middle of their recitation of WHITE LION's complaints. All other moving companies with equivalent numbers of complaints were driven out of business in Palm Beach County. WHITE LION showed a significant loss of income and barely survived. Task Force movers, the evidence showed, were blessed with rising revenues during these time periods.

FISCHER began complaining himself to DCA concerning this unfair listing of meritless complaints on his BIR. He had first confronted Moore with his concerns in August, 2000. After he attended the Task Force meeting on February 28, 2001, he brought his concerns from Moore to Milelli to Commissioner Roberts and then back to Assistant County Attorney Wynn. He was unambiguously told that it was the COUNTY's policy to list all complaints on a mover's BIR regardless of merit. He was told that was the policy and there was nothing he could do about it.

3. *Equal Protection Violation in Enforcement of Ordinance.*

During the first year that the Revised Ordinance was in effect, FISCHER assumed that the problems he was having with meritless complaints on his BIR were shared with other movers. After he attended the Task Force meeting on February 28, 2001, he began to believe that the Task Force movers were getting special treatment from the COUNTY. He attended more Task Force meetings, and at one point learned that none of the Task Force movers had more than one complaint on their BIR. Incredulous, he asked one of their representatives present who told him that Moore "helps us out with those". She further expressed surprise that FISCHER's company did not receive the same treatment. Following this incident, FISCHER as well as others acting on his behest contacted DCA's telephone number to inquire about the complaint history for Task Force movers versus non-Task Force movers. They not only learned as a matter of fact that non-Task Force movers had double-digit complaint histories, but all Task Force movers had none or one at the most. Some of these calls were recorded by FISCHER and his friends. In a couple of recordings, DCA staff clearly disparaged WHITE LION and the "Fischer boys", who were always coming to DCA because of their many complaints. Certain Task Force movers, particularly A-1 Moving were held up as model movers. A-1 Moving's president, Tom Klause, was characterized as a "family man" who was instrumental in "cleaning up" the moving industry in Palm Beach County. All of this was captured on tape and played to the jury. Tim Brown's recounting of the special treatment which Task Force movers were promised

they would receive in the handling of cargo damage claims has already been described. In August, 2001, FISCHER had confronted Moore with proof that WHITE LION was being treated differently than Task Force movers. He had documented the disparate treatment, but Moore had brushed him off challenging him to "prove it". FISCHER set about to do just that.

FISCHER devised a scheme to prove the disparate treatment. An employee of his named Dwayne Josephs hired A-1 Moving for a real move from a location in Palm Beach County to another in Broward County. At FISCHER's request, Josephs filed a complaint against A-1 Moving. There was an accusation of an excessive "tip", which when requested by movers still holding a customer's property "hostage" was an abuse the Revised Ordinance was intended to end. The DCA staffer who took the call refused to file a complaint, and tried to refer Josephs/FISCHER back to A-1 Moving and its president, Tom Klause. When Josephs/FISCHER sent in a written complaint, it was not recorded on A-1 Moving's BIR. When DCA notified A-1 Moving of the complaint, Josephs was accused of having passed a bad check. DCA then attempted to contact Josephs in order to collect the money from him to pay A-1 Moving, including thee excessive tip. When a couple of efforts to contact Josephs by telephone failed, his complaint was dismissed. In the meantime, DCA had established that A-1 Moving was not using the Disclosure Form mandated by the Revised Ordinance. In a memo from Mr. Klause, he admitted to that violation, but defended his use of the old form. In another communication, Mr. Klause requested that the Josephs' complaint not appear on his BIR. At trial, the COUNTY claimed that the complaint had initially been recorded on A-1

Moving's BIR, but that it had been removed immediately after it was dismissed. No evidence was introduced to support this contention. Later in 2002, when FISCHER was preparing to meet with Moore and he alerted him to the absence of the Josephs' complaint from A-1 Moving's BIR, it was recorded. It was again removed from A-1 Moving's BIR, however, when A-1 Moving confirmed that Josephs had made good on the bad check.

During the same period of time, FISCHER had his ex-wife, Erica Delaney, file a complaint against WHITE LION for a move that never happened in reality, but purported to be from Palm Beach County to Broward County: the same scenario as in the Josephs situation. There was an allegation of a cargo damage claim and over-billing. The staff at DCA accepted the complaint immediately. Eventually, Ms. Delany called DCA to inform them that she had been mistaken. There was a change order she had signed, and the lost/damaged goods had been found. Since there was no wrongdoing at all on the part of WHITE LION, she requested that her complaint be withdrawn. Despite that request, the Delaney complaint remained on WHITE LION's BIR for another two years. The clear contrast between DCA's treatment of the Josephs and Delaney complaints provided powerful evidence of the equal protection violation.

There was more evidence of disparate treatment. WHITE LION proved that the signage provisions of the Revised Ordinance, the advertising provisions were enforced against WHITE LION, but not Task Force movers. There was a complaint leveled against WHITE LION for not having used the new Disclosure Form, which was applied to a move made in May, 2000, which was one month before the June, 2000,

compliance deadline which the COUNTY had announced at a mass meeting convened of all movers to explain the Revised Ordinance. Another complaint was leveled against WHITE LION for the same offense in June, 2000, for failing to use the new Disclosure Form for a "re-move". In that case, the customers' goods were moved from their residence to a storage facility prior to the effective date of the Revised Ordinance. All of the paperwork conformed to the law at that time. When the customer wanted his goods moved out of storage into his new home, which was not a new move, the new Disclosure Form was not used. This alleged violation earned WHITE LION a visit from Tom Hitt because of his "concern" over WHITE LION's compliance with the law. On the other hand, A-1 Moving was not only able to admit without any complaint or protest from the COUNTY to not having used the new Disclosure Form in the Josephs complaint almost two years after the effective date of the Revised Ordinance, but it admitted that it never used the new Disclosure Form, and had no intention to do so. Evidence at trial confirmed that A-1 Moving did not use the new Disclosure Form until late 2004: almost five years after the passage of the Revised Ordinance!

The equal protection argument was slightly different from the due process one. In the due process argument, the non-renewal/suspension of WHITE LION's permit to operate in Palm Beach County and the recording of meritless and/or cargo damage claims on WHITE LION's BIR was the result of a system set up which was announced to FISCHER as COUNTY policy by those empowered to make those representations. That system failed to provide adequate notice or a meaningful opportunity to be heard. The equal protection violation, on the other

hand, was the result of a tacit, unwritten policy. It was that policy which would impose the full burden of the law on WHITE LION and other non-Task Force movers while leaving the Task Movers unmolested or unscathed and able to continue to operate as they had always been able to operate. All the while, the Task Force movers benefited from the COUNTY's endorsement of their business practices and an increase in revenue as their competition was beat down.

4. *WHITE LION Attempts to Obtain Relief by Challenging the COUNTY.*

FISCHER began to understand as far back as February/March, 2001, that the COUNTY's policies violated both his due process and equal protection rights. He had been told by Moore/his boss, Paul Milelli, the Assistant County Attorney responsible for moving ordinance issues, and Commissioner Carol Roberts that the due process violation relating to the filing of complaints was the law and he had to live with it. When he stumbled upon the truth of the disparate treatment, he brought his concerns to Moore's attention in August, 2001, but he was challenged to prove them. He built his case and prepared to present it to the COUNTY. In September, 2001, FISCHER notified by letter and photograph the fact that Task Force movers were in violation of the signage provisions but had not been cited for them.

In August and September, 2002, FISCHER and his attorneys met with Moore, Milelli, Wynne and others from DCA to present his case. He presented his evidence of both the due process and equal protection violations as set forth above. After a series of meetings, Moore prepared a Memorandum for

circulation to his superiors in an effort to provide them with information and an interpretation of COUNTY policy in response to WHITE LION's complaints. It articulated accurately FISCHER's concerns about the injustice of recording cargo damage claims where there has been no wrongdoing on WHITE LION's BIR. It concluded as follows:

> White Lion Moving & Storage appears to leading the issue relating to reporting 'claims/damage' complaints. We have been reporting to the public that White Lion had 26 consumer complaints filed against them over the past three-year period. Here is the breakdown of the moving companies with the top five number of consumer complaints (out of approximately 200 moving companies who have received consumer complaints within the past three years):
>
> | | | |
> |---|---|---|
> | East Coast Moving & Storage | 29 | out of business |
> | White Lion Moving & Storage | 26 | currently licensed |
> | Trans-Continental Van Lines | 21 | out of business |
> | Atlantic Express Moving & Storage | 20 | out of business |
> | All State Handling, Inc. | 17 | out of business |
>
> If we were compelled to cease reporting all consumer complaints dealing with destroyed, damaged or lost household goods, then White Lion Moving would have between 6 and 17 complaints (depending our negotiations) removed from our phone reports to the public.

> We have just completed an audit of all 478 consumer complaint cases against 200 plus/minus moving companies over the past three-year period. We have discovered that if you are compelled to stop informing the phoning public of all cases against moving companies dealing with destroyed, damaged, or lost household goods–than 28.3% of the cases/complaints would not be reported to the public (in our phone conversations).

In other words, the issue was not whether WHITE LION was in violation of the law, but whether it would continue to have a large number of unjustifiable complaints lodged on its BIR. Elsewhere in the Memorandum, and pursuant to negotiation, approximately four-seven complaints not related to cargo/damage claims were similarly meritless and determined to be removed from WHITE LION's BIR. This left WHITE LION's BIR with only two or three legitimate complaints over a three-year period of time. This paints a much different picture from the 26 complaints being reported to consumers during that same period.

After this Memorandum was circulated through the COUNTY, another meeting took place with FISCHER and his attorneys. At that time, a new COUNTY policy was announced. Henceforth, the COUNTY would remove the four or five non-meritorious complaints from WHITE LION's BIR (although this was not accomplished for eight months), and the cargo/damage claims would remain on WHITE LION's BIR, but be redesignated as "not in violation of the Ordinance". The DCA staff would be instructed not to describe the complaints over the telephone, but only

to give the numbers. This was clearly an unacceptable change in policy.

FISCHER tried to take his case to Harold Weissman, who was the COUNTY Administrator. Weissman's office referred him to Vince Bonvento, who was his assistant. FISCHER met with Bonvento twice. He tried to convince Bonvento to conduct an investigation and gave him a list of witnesses. FISCHER explained in great detail the due process/equal protection violations detailed above to Bonvento. At a second meeting with Bonvento, Moore and Milelli were present. FISCHER learned that no investigation had been undertaken on his complaints. Bonvento told FISCHER that he was going to do nothing and he should to learn to live with that. FISCHER promised to take legal action.

The complaint in this case was initially against the COUNTY and a number of the officials who had been involved in the case on a personal basis, and alleged two counts of violations of Section 1983, one for due process and the other for equal protection, and some pendant State claims. By the time of trial, the only defendants left standing were the COUNTY and Moore. The jury found in favor of Moore on an individual basis. The jury found in favor of FISCHER and WHITE LION as to the Section 1983 counts against the COUNTY and awarded them a total of $1,100,000.00 as to Count I (due process) and $400,000.00 as to Count II (equal protection).

The County Attorney's Office represented both the COUNTY and Moore at trial. A good portion of its defense was aimed to show a lack of maliciousness on the part of Moore. The jury was advised to consider that Moore was not responsible for what violations were established because the COUNTY was just

following its process and policy. When the jury exonerated him, however, the COUNTY shifted gears. In its Motion for Judgment Notwithstanding the Verdict, the COUNTY argued that the only wrongdoing alleged and proven at trial were actions by Moore. Since Moore had been exonerated, no constitutional violations had occurred. The COUNTY focused on Moore's status as a "final policymaker". It was alleged that since Moore did not make policy for Palm Beach County, he was not a "final policymaker" and his actions could not bind the COUNTY under the authority of *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 1018, 56 L.Ed.2d 611 (1978).

The jury in this case had been instructed that the Board of County Commissioners and Harold Weissman the County Administrator were, as a matter of law, "final policymakers" for Palm Beach County. The jury was properly instructed on the standards it should follow to find COUNTY liability. The jury was not advised of the need to identify "final policymakers", only COUNTY policy.

The District Court granted the COUNTY's Motion for Judgment Notwithstanding the Verdict. It determined that Moore was not a "final policymaker". He was characterized instead as a "decision-maker". The District Court did not consider FISCHER and WHITE LION's argument that the due process and equal protection violations were part of either the way in which the COUNTY structured the re-licensing and/or complaint-recording process or represented an unwritten policy. The District Court appeared to accept the COUNTY's argument that the case was only about what Moore had done, and if Moore had been exonerated from personal liability, then there was

nothing for the COUNTY to either have delegated or to have ratified after-the-fact.

On appeal to the Eleventh Circuit, the COUNTY went one step further removed from the issues determined at trial. It complained that the COUNTY should not be liable because the final policymakers were not made personally aware of FISCHER and WHITE LION's complaints. It was suggested that FISCHER would have been required to lobby his concerns directly to the Board of County Commissioners. The unpublished Panel Opinion from the Eleventh Circuit endorsed the view that all of FISCHER's efforts to get the COUNTY's attention to the constitutionally violative system it had constructed to enforce the Revised Moving Ordinance failed because he had not gone high enough up the ladder.

This is a case of first impression as to the interpretation of *Monell* in a situation where an entire regulatory department of a municipal government is structured, managed, supervised, trained and otherwise directed to implement procedures and practices which violated constitutional rights over an extended period of time. Legally, this case is distinguishable from all those cases which represent a litigant's effort to impose municipal liability based upon one instance of misconduct. In those cases, municipal liability has to be focused on what, if anything, a final policymaker might have personally known or done in terms of the violation. Both the District Court and the Eleventh Circuit decided that the absence of a "final policymaker" in the day-to-day operations of the DCA prevented municipal liability under *Monell*. The properly instructed jury was entitled to consider the regulatory scheme set up by the regulating agency, the DCA, as established to further COUNTY policy.

Raising the issue of "final policymaker" post-trial as a means of discovering that verdict was wrong. FISCHER and WHITE LION had the right on appeal to have this issue resolved as a matter of law. Instead, the Eleventh Circuit conjured up another barrier to relief: That the Board of County Commissioners had not received notice of his complaints. This Court needs to accept certiorari in this case to clarify the law interpreting Section 1983 and affirm that municipal liability under Monell extends to the implementation of a regulatory scheme by a regulating agency in furtherance of policy goals endorsed, delegated or ratified by a municipality's "final policymakers" and to validate the right of the plaintiff to the benefit of a favorable jury verdict when the District Court post-trial and the Court of Appeals issue judgment against him as a matter of law based on issues not litigated at trial.

REASONS FOR GRANTING THE PETITION

I. THAT MUNICIPAL LIABILITY UNDER *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 1018, 56 L.Ed.2d 611 (1978), WILL LIE WHEN THE MOVING FORCE BEHIND THE CONSTITUTIONAL VIOLATIONS PROVEN AT TRIAL WAS THE ENFORCEMENT OF A REGULATORY ORDINANCE BY THE REGULATING AGENCY IN A MANNER AND THROUGH MEANS CONSISTENT WITH THE POLICIES ESTABLISHED BY THE FINAL POLICYMAKERS.

II. THAT THE PLAINTIFFS' SEVENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE DISTRICT COURT ISSUED JUDGMENT NOTWITHSTANDING THE FAVORABLE VERDICT AS A MATTER OF LAW BASED ON THE GROUNDS NOT LITIGATED AT TRIAL, AND WHEN THAT JUDGMENT WAS AFFIRMED BY THE COURT OF APPEALS ON YET ANOTHER GROUND NOT RAISED BY THE PARTIES AT TRIAL.

The evidence established at trial that the DCA, which was delegated the responsibility of enforcing the Revised Ordinance implemented the policies which violated the due process and equal protection rights of WHITE LION and FISCHER. The "final policymakers", the Board of County Commissioners, had passed the Revised Ordinance. Another "final policymaker", County Administrator Harold Weissman, was responsible for the executive administration of the COUNTY overall, but he had no role in the day-to-day operations of DCA.

The procedure for implementing the Revised Ordinance was set by DCA, which was run by Moore. Moore identified himself at trial as a "policymaker" for implementing the Revised Ordinance. As FISCHER learned when he began to complain that WHITE LION was not afforded notice and a meaningful opportunity to be heard regarding the filing of consumer complaints on its BIR, the higher-ups at the COUNTY backed his position. Commissioner Roberts, the final policymaker who took the lead in this issue, referred him to the Director of Public Works, the direct supervisor over DCA, and the County Attorney's Office.

They all told him that what DCA was doing was

COUNTY policy. At trial, the COUNTY did nothing to dispute this policy position. After FISCHER had gathered his evidence, he petitioned again, and although there was some adjustment in policy, it was proven at trial to be inadequate to remedy the due process violations. The arbitrary and capricious enforcement of COUNTY policy by DCA in its refusal or delays in renewing WHITE LION's license caused damage to WHITE LION's business when prospective customers were advised by DCA, again pursuant to policy, of its unlicensed status. At trial, the COUNTY went to great lengths to establish the adequacy of its due process in this regard, but those efforts were rejected by the jury. As to equal protection, the evidence established an unwritten custom and policy wherein certain moving companies, such as WHITE LION, were discriminated against in favor of other moving companies, such as those favored to be members of the Moving Task Force. The testimony of Tim Brown established that cargo damage claims were handled differently for Task Force as opposed to non-Task Force movers. FISCHER's investigation into all aspects of Revised Ordinance enforcement bore this out. The Memorandum of September 18, 2002, demonstrated the importance in the implementation of COUNTY policy that cargo damage claims be left on moving companies' BIR's. The policies, either written or unwritten, implemented by the DCA to advance the greater public policy goal of driving "bad" movers from Palm Beach County and ending the abuses by the moving industry constituted the moving force behind the constitutional violations established by the evidence at trial.

The interrogatory verdicts utilized in this case clearly asked the jury to make the appropriate finding

on the factual issues. The jury was asked whether the COUNTY had deprived WHITE LION and FISCHER of a property interest without having provided a reasonable notice or opportunity to be heard, failed to provide a sufficient State remedy, and that the deprivation of procedural due process occurred "as the direct result of the COUNTY's ordinance, regulation, decision, policy, or custom". As to equal protection, the interrogatory verdicts had the jury making findings of fact to determine that the COUNTY had acted less favorably against WHITE LION and FISCHER than similarly situated individuals "in the enforcement of the Palm Beach County Moving Ordinance and in the investigation, maintenance, and reporting of consumer complaint records", that the unequal treatment was based upon . . . a malicious or bad-faith intent to injure, and that the selected treatment occurred "as a direct result of Palm Beach County's ordinance, regulation, decision, policy, or custom".

Although Section 1983 does not specifically provide for a right to trial by jury, this Court has held that the Seventh Amendment applies to guarantee that right. *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). The Seventh Amendment guarantees a party to a civil action with the right to have a jury determine based upon the facts that municipal liability applied in a Section 1983 action. This is particularly the case where it is the implementation of a regulatory ordinance by the regulatory agency.

The jury clearly found that the actions of the regulatory agency undertaken in furtherance of COUNTY policy would, and should, bind the COUNTY under this Court's decision in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98

S.Ct. 1018, 56 L.Ed.2d 611 (1978). There was never any suggestion made that the jury in this case was not entitled to make those findings of fact which held the COUNTY liable for the due process and equal protection violations proven.

In *Monell*, this Court set forth the standard for determining municipal liability for violations of Section 1983. The Court first established that a municipality or other local government unit constituted a "person" subject to liability under Section 1983. It then stated that:

> Local governing bodies, therefore, can be sued directly under Section 1983 for monetary, declaratory, or injuctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the Section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other Section 1983 "person", by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels.

436 U.S. at 690-691, 98 S.Ct. at 2035-2036.

The *Monell* Court went on to quote favorably from Justice Harlan writing for the Court in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-8, 90 S.Ct. 1598,

1613, 26 L.Ed.2d 142 (1970):

> "Congress included customs and usages [in section 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well-settled as to constitute a 'custom or usage' with the force of law."

Id., at 691, 98 S.Ct. at 2036. The Courts have recognized that "[u]nlike a policy, which comes into existence because of a topdown affirmative decision of a policy maker, a custom develops from the bottom up." *Baron v. Suffolk County Sheriff's Office*, 402 F.3d 225, 236 (1st Cir. 1995), quoting *Britton v. Maloney*, 901 F.Supp. 444, 450 (D.Mass. 1995), *aff'd in part and rev'd in part on other grounds*, 196 F.3d 24 (1st Cir. 1999). In a Section 1983 suit premised on custom, or a bottom-up policy, it must be determined whether the custom is fairly attributable to the municipality. *Id.*, citing *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989). The standard is met when the custom is "so well-settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice." *Id.* FISCHER and WHITE LION clearly met this burden as found by the jury.

The *Monell* Court concludes "that a local government may not be sued under Section 1983 for injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to be official

policy, inflicts the injury that the government as an entity is responsibility under Section 1983." *Id.*, at 694, 98 S.Ct. at 2037-8. The Court warned, however, that it was not in *Monell* setting forth all of the circumstances when Section 1983 liability could be imposed. The jury in this case was instructed based upon the above-quoted language. The Revised Moving Ordinance was passed by the Board of County Commissioners as official policy. Within the COUNTY bureaucracy, it was up to DCA to implement that policy. Ultimately, Harold Weissman as a COUNTY administrator could be said to have responsibility for the operations of DCA although he delegated the implementation of those policies to the Department of Public Safety, which in turn delegated the day-to-day operations to DCA. An aggrieved citizen, such as FISCHER on behalf of WHITE LION, was forced to climb the ladder with its grievances. In this case, there is no doubt from a factual standpoint that FISCHER and WHITE LION had properly discerned COUNTY policy, particularly as it related to the due process violations alleged in Count I. As for the equal protection violation alleged in Count II, COUNTY policy was more difficult to ascertain. There was no provision of the Revised Moving Ordinance that made the disparate treatment between Task Force and non-Task Force movers official COUNTY policy. According to the evidence adduced at trial, however, the COUNTY in its implementations of the regulatory scheme did violate the equal protection rights of WHITE LION. As FISCHER attempted to climb the bureaucratic ladder, his accusations of unequal treatment were denied by Moore, backed up by Milelli and Bonvento, who had "taken the meeting" with FISCHER when Weissman would not see him. The jury was justified in finding

that the equal protection violation existed regardless of whether Moore was considered a "final policymaker".

As Director of DCA, Dennis Moore was the focus of a lot of evidence. He was also a party defendant at trial, who was found not liable by the jury. This appeared to have been based upon the jury's acceptance of his defense that he was merely implementing COUNTY policy. It was argued that he could not be held responsible for a policy imposed upon him by higher-ups or by the tortious acts of his subordinates which he disapproved. Whether or not he was a "final policymaker" was irrelevant because he was presiding over a regulatory agency implementing a regulatory statute in a way which violated due process and equal protection. The "final policymakers" had delegated the implementation of the Revised Ordinance to DCA, and when FISCHER and WHITE LION complained about that policy, the "final policymakers" ratified that policy by backing DCA. FISCHER and WHITE LION were entitled to rely on DCA, the Department of Public Safety, the County Attorney's Office, Commissioner Roberts and the Assistant to the County Administrator as people "whose edicts or acts may fairly be said to be official policy."

When the District Court accepted the COUNTY's argument and granted Judgment Notwithstanding the Verdict, it narrowed the scope of Section 1983 liability to constitutional violations which were either committed by "final policymakers" or done by subordinates at the behest of or in the name of those "final policymakers". This hunt for a "final policymaker" was <u>not</u> an issue at trial. The jury was asked to decide if there was a constitutional violation, and whether it was caused by COUNTY policy, which is what Section 1983 proscribes. By basing its ruling on

an issue which was not presented to the jury for its consideration, the District Court not only unduly restricted municipal liability under *Monell*, it violated FISCHER and WHITE LION's Seventh Amendment right to trial by jury. When the Eleventh Circuit affirmed the District Court's decision "because no evidence in the Record supports the conclusion that the County Commissioners were aware of or ratified any custom or policy that violated the equal protection or due process rights of the Plaintiffs", it went even further to restrict liability under *Monell* and violate FISCHER and WHITE LION's Seventh Amendment rights.

As to *Monell* liability, there is no requirement that a "final policymaker" be individually directly or indirectly involved in the conduct which violates a person's constitutional rights. As a practical matter, almost all cases where Section 1983 is the basis of the lawsuit involve single acts by employees of a governmental entity. In those instances, it is necessary for the Court to identify an actor, and then determine whether that actor is a "final policymaker". *See, e.g., McMillian v. Monroe County Ala.*, 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997); *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997); *Swint v. Chambers County Com'n*, 514 U.S. 35, 115 S.Ct. 1203, 131 L.Ed. 60 (1995); *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). In those cases, having determined which municipal employee was responsible for the aggrieved conduct, the Court could then determine as a matter of

State law whether that individual is the appropriate "final policymaker". These were not cases when a regulatory agency was implementing a municipal policy.

Cases against police officers for violations of constitutional rights resulting from the application of excessive force or illegal arrest cannot cause their employers liability under *Monell* unless the plaintiff can establish some flaw in training or supervision as the moving force of the constitutional violation. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). The problem faced by plaintiffs in Section 1983 actions against municipalities based upon the conduct of their police officers is establishing how one isolated instance can be attributed to any policy. In the instant case, it was the actions at the municipal agency in its reggulating capacity over a lengthy period of time which was the moving force behind the constitutional violation, not the actions of mere employees.

FISCHER and WHITE LION never sought to prove that Dennis Moore was the moving force of the constitutional violations committed by the COUNTY. It is true that Moore's personal conduct was not determined to be egregious enough to warrant a finding of individual liability, but the jury determined not that Moore did or did not violate any constitutional rights but that the COUNTY did. It was the system set up at DCA to enforce the Revised Moving Ordinance and implement its provisions in order to further the policies set by the Board of County Commissioners and the

County Administrator which was proven at trial.

It is a violation of the Seventh Amendment for a plaintiff to prove his case to a jury on one theory, and then have the trial judge or appellate court deny him or her the benefit of a favorable verdict by raising an issue which was not tried before and considered by the jury. *See, generally, Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967). *Neely* teaches that Courts of Appeal should be "constantly alert" to "the trial judge's firsthand knowledge of the witnesses, testimony, and issues". Rule 50 of the Federal Rules of Civil Procedure governs Motions for Judgment as a Matter of Law in jury trials. Rule 50(a) requires the Court to consider whether there is any legally sufficient evidence to sustain a judgment on behalf of any party during trial. Rule 50(b) allows for a reconsideration of that ruling after the jury's verdict. In order for a defendant to benefit from a dismissal under Rule 50(b), he must first show that he had presented all grounds for requested judgment as a matter of law under Rule 50(a). *Ross v. Rhodes Furniture Inc.*, 136 F.3d 1286, 1289 (1998). When reviewing the Judgment on appeal, the Court of Appeals is supposed to compare the arguments raised in the Rule 50(b) Motion with those raised in its Rule 50(a) Motion. *Id.*, citing *National Indus. Inc. v. Sharon Steel Corp.*, 781 F.2d 1545 (11th Cir. 1986); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 845-6 (5th Cir. 1975).

In the instant case, the COUNTY did not make an argument under Rule 50(a) as to Count I, the due process violation, that it should escape liability under Section 1983 because Dennis Moore was not a "final policymaker". That argument was made in connection with Count II, the equal protection violation. In its Motion for Judgment Notwithstanding the Verdict, the

COUNTY raised the issue of Dennis Moore's "final policymaker" status as to both Counts. In its Response, FISHER and WHITE LION did not formally invoke this rule to argue against the Moore as final policymaker argument as to Count I, but summarized the evidence and the jury instructions on interrogatory verdict forms that supported the verdict as it related to COUNTY policy. FISCHER and WHITE LION also noted in their Response that Moore was a policymaker, both by his own admission and by the testimony of everyone that he managed the day-to-day operations of DCA. His second-in-command, Hitt, described an informal procedure for moving companies to complain about DCA actions against their license or in the filing of complaints which involved a review by Moore. He had the power to decide whether or not he wanted to grant relief or deny it. Milelli testified to exercising some oversight over Moore, but mostly in support of his management. Although Rule 50(b) limitations were not specifically argued as a procedural bar, FISCHER and WHITE LION advanced the factual and legal arguments supporting the jury's verdict based upon the law it was read, not as the COUNTY wanted to reinterpret it..

The Eleventh Circuit likewise added an additional element and an additional burden on FISCHER and WHITE LION to establish a Section 1983 violation. Now, specific notice to the Board of County Commissioners had to be proven in order to establish ratification. There was no mention or consideration of FISCHER's efforts, which were rebutted, to bring his case to Harold Weissman's attention, who was also a "final policymaker". There is no authority from this Court which requires a plaintiff to appear before the Board of County Commissioners as

a group and provide notice of constitutional violations based on municipal authority. FISCHER and WHITE LION had not addressed that issue at trial because it was not an issue until the Eleventh Circuit entered its opinion, which was a Seventh Amendment violation by itself. This was an entirely new twist on the moving target which FISCHER and WHITE LION found themselves having to hit as they tried to justify the verdict entered in their favor. In *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S.Ct. 1011, 105 L.Ed.2d 958 (2000), this Court addressed the right of an appellate court to enter a judgment as a matter of law upon a finding on appeal that evidence had been unlawfully admitted, and without that evidence, the plaintiff could not meet its burden of proof as a matter of law. In its holding, however, the *Weisgram* Court was limited to issues which were being litigated at the trial level. It did not authorize considering legal issues raised for the first time after the trial or, for the first time on appeal.

FISCHER and WHITE LION had appealed the District Court's granting of the COUNTY's Motion for Judgment Notwithstanding the Verdict on the grounds that the District Court erred as a matter of law in determining that the jury's verdict depended upon a determination that Dennis Moore was a "final policymaker". The Eleventh Circuit did not rule on that point. Instead, the Eleventh Circuit determined that there was insufficient evidence that the Board of County Commissioners had been explicitly notified of the constitutional violations. Now, there were two issues which were found not to be proven at trial which were not litigated at trial. How were FISCHER and WHITE LION supposed to adjust their case to prove elements not presented to the jury? To what extent were they compelled to do so? The answer should be

that the jury verdict should stand and the subsequent rulings which negated it vacated.

CONCLUSION

Petitioners have established by competent evidence before a jury that their due process and equal protection rights were violated by the COUNTY under the interpretation of Section 1983 under *Monell.* The District Court granted Judgment against them as Matter of Law on improper grounds. The identification of any actor as a "final policymaker" as a way of limiting the application of *Monell* in this case was an error at law as applied to the implementation of a regulatory law by the regulating agency. The Eleventh Circuit's decision raised yet another issue not even argued by the parties, which further violated *Monell* and the Seventh Amendment. This Court should accept certiorari to affirm Monell, address the role played by "final policymakers" in determining municipal policy in regulation cases, clarify the right of trial and appellate courts to negate jury verdicts based on issues not raised at trial and hear the case on its merits.

Respectfully submitted,

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No. 06-15394
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WHITE LION VAN LINES, INC., a Florida corporation, GREG FISCHER, Plaintiffs-Appellants,

versus

PALM BEACH COUNTY, FLORIDA, a charter county and political subdivision of the State of Florida, PALM BEACH COUNTY BOARD OF COMMISSIONERS, the governing body of the county, et al., Defendants-Appellees.

February 20, 2008, Decided

February 20, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For White Lion Van Lines, Inc., Greg Fischer, Appellant: Charles Garret White, Attorney at Law, MIAMI, FL.

For Palm Beach County, Florida, Appellee: Dawn S. Wynn, Palm Beach County Attorney's Office, West Palm Beach, FL.

JUDGES: Before ANDERSON and BARKETT, Circuit Judges, and TRAGER, * District Judge.

OPINION

PER CURIAM:

The plaintiffs, White Lion Van Lines, Inc. and Greg Fischer, sued Palm Beach County, Florida and Dennis Moore under 42 U.S.C. § 1983, claiming that the County and Moore unconstitutionally deprived them of due process and equal protection in their implementation of Palm Beach County Moving Ordinance No. 2000-010. The plaintiffs' theory of the case was that the Division of Consumer Affairs of Palm Beach County ("DCA") and its director, Moore, treated complaints made against White Lion differently, and less favorably, than those made against moving companies on the DCA's Moving Task Force, and that the DCA and Moore otherwise unconstitutionally implemented the Ordinance.

A jury found Moore not liable but found that the County had violated the due process and equal protection rights of White Lion and Fischer. The district court subsequently granted the County's renewed motion for judgment notwithstanding the verdict, concluding that the evidence presented at trial did not support imposition of municipal liability upon the County. White Lion and Fischer appeal from that judgment. We affirm because no evidence in the record supports the conclusion that the County Commissioners were aware of or ratified any custom or policy that violated the equal protection or due process rights of the plaintiffs.

AFFIRMED.

Footnotes

*Honorable David G. Trager, United States District Judge for the Eastern District of New York, sitting by designation.

Filed 8/31/2006
CASE NO. 04-5073 8-CIV-DIMITROULEAS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WHITE LION VAN LINES, INC., a Florida corporation, and GREG FISCHER, Plaintiffs,
v.
PALM BEACH COUNTY COMMISSION, and DENNIS MOORS, Defendants.

ORDER GRANTING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL

THIS CAUSE is before the Court upon Defendant Palm Beach County's Motion for Judgment Notwithstanding the Verdict [DE 152-1],[1] or in the alternative, Motion for New Trial [DE 152-2]. The Court has carefully considered this Motion, Plaintiffs' White Lion Van Lines, Inc. and Greg Fischer's Response [DE 157], Defendant Palm Beach County's Reply [DE 159] and is otherwise fully advised in the premises.

I.BACKGROUND

On October 20, 2004, Plaintiffs White Lion Van Lines, Inc. ("White Lion") and Greg Fischer ("Fischer") (collectively the "Plaintiffs") filed a First Amended Verified Complaint [DE 20] against Defendants Palm Beach County Commission ("Palm Beach"), Vince Bonvento ("Bonvento"), and Dennis Moore ("Moore") alleging counts for deprivation of procedural due process, deprivation of equal protection under the law,

defamation, or in the alternative libel or slander per se, tortious interference of existing and prospective business relationships, negligent retention of Moore, and negligence. On December 1, 2005, an Order Granting, in part, the Defendants' Motions for Summary Judgment [DE 89] was entered that dismissed the defamation against Moore, dismissed all counts to the extent they were asserted against Bonvento, and dismissed all counts asserted against Moore and/or Bonvento in their official capacities. After a trial on the remaining counts the jury returned a verdict on July 5, 2006, against Palm Beach on the deprivation of due process and equal protection counts, and in favor of Defendants on all other counts. On July 6, 2006, the Court issued a Final Judgment and Order Closing Case [DE 151] consistent with the jury's findings that entered judgment in favor of the white Lion and against Palm Beach in the amount of $1,100,000.00, and entered judgment in favor of Fischer and against Palm Beach in the amount of $400,000.00.

Palm Beach now requests that the Court enter judgment as a matter of law in its favor. Palm Beach argues that the there was an insufficient evidentiary basis to impose municipal liability for deprivation of due process and equal protection under Section 1953. Plaintiffs counter that the jury's verdict was proper, and that Palm Beach's request for judgment as a matter of law should be denied. Moreover, if judgment as a matter of law is not granted, Palm Beach moves for a new trial. For the following reasons the Court agrees with Palm Beach.

II. DISCUSSION

A renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(6) applies the same standards set forth for a motion for judgment as a matter of law by Federal Rule of Civil Procedure 50(a). Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 903 (11th Cir. 2004). According to Federal Rule of Civil Procedure 50(a):

> [i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed.R.Civ.P. 50(a).

Under this standard, a district court should grant judgment as a matter of law when a party fails to present a legally sufficient evidentiary basis upon which a reasonable jury could find each material element of the cause of action. Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1278 (11th Cir. 2005).

However, a district court should deny judgment as a matter of law when a party presents enough evidence to create a substantial conflict in evidence on the material elements of the cause of action. Id. at 1278-79. When deciding a motion for judgment as a matter of law the district court must weigh the evidence in a light most favorable to the nonmoving party. See e.g.,

Reynolds v.CLP Corp., 812 F.2d 671, 674 (11th Cir. 1987). However, the court may not weigh conflicting evidence or make credibility determinations. Id.

However, unlike motions for judgment as a matter of law, motions for a new trial "are committed to the sound discretion of the district court. "fn2 McDonough Power Equip. v. Greenwood, 464 U.S. 548, 556 (1984); see also Hessen v. Jaguar Cars, 915 F.2d 641, 644 (11th Cir. 1990). Accordingly, the district court is permitted to weigh the evidence when deciding a motion for a new trial. Watts v. Great Atl. & Pac. Tea Co., 842 F.2d 307, 310 (11th Cir. 1988).

A motion for new trial should be granted when "'the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.'" Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1186 (11th Cir 2001). A new trial may be granted for several reasons; including when a jury's verdict is against the great weight of the evidence or when substantial errors occur in the admission of the jury instructions.[3] See e.g., Haygood v. Auto-Owners Ins. Co., 995 F.2d 1512, 1514-15 (11th Cir. 1993); Johnson v.Bryant, 671 F.2d 1276, 1280 (11th Cir. 1982). However, no matter what grounds are asserted, the overarching inquiry on a motion for a new trial remains whether a new trial is necessary to prevent injustice. Delta Eng'g Corp. v. Scott, 322 F.2d 11, 15-16 (5th Cir. 1963),[4] cert. denied, 377 U.S. 905 (1964); see also Belk v. City of Eldon, 228 F.3d 872, 878 (8th Cir. 2000), cert. denied, 532 U.S. 1008.

A. Renewed Motion for Judgment as a Matter of Law

In its instant Motion, Palm Beach moves for judgment as a matter of law on the Plaintiffs' procedural due process and equal protection counts. In essence, Palm Beach argues that there was insufficient evidence to impose Section 1983 municipal liability on either count. According to Palm Beach, the Plaintiffs failed to present sufficient evidence: (1) of a custom or policy that could be attributable to a final policyrnaker of Palm Beach, (2) that a delegation of authority was made to a lower-ranking official who then deprived Plaintiffs of their constitutional rights, or (3) that Palm Beach's final policyrnakers ratified the unconstitutional actions of lower level officials. Plaintiffs counter that the evidence supports a finding that: (1) Moore was a final policyrnaker for Palm Beach, (2) a delegation of authority was made to Moore, who then deprived Plaintiffs of their constitutional rights, or (3) Palm Beach's final policymakers ratified unconstitutional behavior. When viewing the evidence in a light most favorable to the Plaintiffs, the Court finds that a reasonable jury could not find municipal liability on this record.

1. Final Policymaker

To impose Section 1983 liability on a municipality a plaintiff must establish: "(1) that [its] constitutional rights were violated, (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right, and (3) that the policy or custom caused the violation." McDowell v. Brown, 392 F.3d 1283, 1289 (11th Cir. 2004). Not every deprivation of a constitutionally protected right, however, will result

in municipal liability.[5] City of St. Louis v. Praprotnik, 485 U.S. 112, 138 (1988). Only deprivations caused by municipal officers or groups that possess final policymaking authority can subject municipalities to Section 1983 liability. Campbell v. Rainbow City, Ala., 434 F.3d 1306, 1312 (11th Cir. 2006). Whether an official has final policymaking authority depends upon state law. Cooper v. Dillon, 403 F.3d 1208, 1221 (11th Cir. 2005). Moreover, while it is the court that must determine which officials have the power to make policy on a particular issue, the jury's role is to decide whether the final policymaker's decision resulted in a deprivation of constitutional rights. Jett v. Dallas Ind. Sch. Dist., 491 U.S. 701, 737 (1989); see also Thomas v. Roberts, 261 F.3d 1160, 1172 (11th Cir. 2001), vacated on other grounds by, 536 U.S. 953 (2002), opinion reinstated by, 323 F.3d 950 (11th Cir. 2003). Final policymaking authority is lacking when an official's decisions are subject to meaningful administrative review. Oladeinde v. City of Birmingham, 230 F.3d 1275, 1296 (11th Cir. 2000). It does not matter, however, whether this review is actually exercised, since the mere "opportunity for meaningful review will suffice to divest an official of any policymaking authority." Id.

For purpose of Section 1983 liability there is a significant difference between an official that is a "decisionmaker" as opposed to an official that is a "final policymaker." Quinn v. Monroe County, 330 F.3d 1320, 1326-28 (11th Cir. 2003). A decisionmaker is someone "who has the power to make official decisions [for the government entity] and, thus, [may] be held individually liable" on a Section 1983 count. Id. at 1326 (emphasis in original). While a final policymaker is someone "who takes actions that may cause [the government entity] to be held liable

for a custom or policy." Id. In essence, a final policymaker is a decisionmaker that "possesses final authority to establish municipal policy." Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986). Only final policymakers have the requisite authority to impose liability upon a government entity under Section 1983. Quinn, 330 F. 3d at 1326-28. Under this framework, an official with the discretion to implement policy, but who is not responsible for establishing that policy, is considered a decisionmaker rather that a final policyrnaker. See Pembaur, 475 U.S. at 482-83, 482 n.12.

The alleged constitutional deprivations, here, revolve around the enforcement of Palm Beach's Moving Ordinance (the "ordinance").[6] Specifically, Plaintiffs argue that Moore harbored a bias against them, since they were not members of a moving task force; which caused Moore to implement a custom or policy whereby the Division of Consumer Affairs ("DCA") deprived the Plaintiffs of their procedural due process and the equal protection rights through the unconstitutional enforcement of the ordinance. In the instant Motion, Palm Beach contends that the record does not contain a legally sufficient evidentiary basis upon which a reasonable jury could find a constitutional deprivation attributable to a final policymaker of Palm Beach. Plaintiffs counter that the evidence established by Moore's testimony demonstrates that he was a final policymaker in regards to enforcement of the ordinance. The Court finds the Plaintiffs' argument unpersuasive.

Here, at most, the evidence supports a conclusion that Moore was a decisionmaker, rather than a final policymaker, with respect to the alleged constitutional deprivations. First, the ordinance in question expressly

provides for an administrative review of the DCA and Moore's actions when enforcing the ordinance. (See, e.g. Moving Ordinance Section 4.k.) Palm Beach's Policies and Procedure Manual, as well as testimonial evidence, also demonstrates that Moore's position-Director of the DCA was supervised by Palm Beach's Director of Public Safety. As such, Moore was subject to meaningful administrative review, which legally precludes him from the having final policymaking authority needed for his actions to be imputed to the municipality.[7]

Second, even though Moore testified that he was a final policymaker, the evidence demonstrates that he was merely a decisionmaker. According to Moore's testimony, he was the "final policymaker" insofar as enforcement of the ordinance was concerned. However, the record is devoid of evidence that Moore possessed final authority to establish municipal policy on behalf of Palm Beach. Rather, Moore possessed some discretion on how Palm Beach's moving policy was implemented, but was never responsible for establishing the moving ordinance. This record at best supports a conclusion that Moore acted as an official decisionmaker with respect to enforcement. As such, while Moore had the decisionrnaking authority that could result in individual liability,[8] he did not have the final policymaking authority required to create municipal liability.

Lastly, at the suggestion of both parties, the Court determined as a matter of law that the final policymakers for purposes of Plaintiffs' Section 1983 counts were the Palm Beach County Board of County Commissioners ("Board") and the County Administrator ("Administrator"). (See Jury Instructions [DE 145] at p. 9). Plaintiffs did not timely

object to this instruction, nor do they now argue that this instruction was incorrect in determining that the County Board and Administrator are final policyrnakers. Rather, Plaintiff argues that Moore should also be considered a final policymaker. However, as explained above, the record does not support a conclusion that Moore was a final policymaker with regards to the alleged constitutional deprivations. Accordingly, the Court finds that the evidence does not support the imposition of municipal liability based upon a theory that Moore was a final policymaker.

2. Delegation

Section 1983 municipal liability may also be imposed based upon a the doctrine of delegation. See e.g., Mandel v. Doe, 888 F.2d 753, 792 (11th Cir. 1989). Delegation occurs when someone with final policyrnaking authority delegates that authority to a lower-ranking official who then acts unconstitutionally in exercising that authority. Matthews v. Columbia County, 294 F.3d 1294, 1297 (11th Cir. 2002). However, even if a delegation of authority has occurred, a municipality is not liable for the subordinate official's decisions when the final policymakers retain the power to review the exercise of the subordinate's discretion. Scala v. City of Winter Park, 116 F.3d 1396, 1399 (11th Cir. 1997).

Here, as discussed at length above, the evidence does not support a conclusion that Moore possessed-either by way of delegation or directly under state law--final policymaking authority. Nevertheless, even if Moore was given such authority, the evidence demonstrates that Palm Beach's final policymakers retained the

power to review any actions taken by Moore. As such, in addition to never possessing final policymaking authority, Moore's actions cannot create municipal liability under the doctrine of delegation.

3. Ratification

Section 1953 municipal liability can also be established based upon the doctrine of ratification. See e.g., Garvie v. City of Ft. Walton Beach, 366 F.3d 1186, 1189 (11th Cir. 2004). Ratification occurs when a subordinate public official acts unconstitutionally, and then the final policyrnaker approves the subordinate's decision and the basis for it. Gattis v. Brice,136 F.3d 724, 727 (11th Cir. 1998). Under the doctrine of ratification it is not enough to demonstrate that one member of the final policymaking authority ratified a subordinate's action and motive. Matthews, 294 F.3d at 1297-98. Rather, the final policymaking authority must ratify the actions and motive in order to impute the subordinate's unconstitutional behavior to the municipality. Id.

Here, the evidence is insufficient to support a conclusion that the County Board or Administrator ratified Moore, or anyone else's, unconstitutional actions and motive. Even assuming that there was some evidence presented to support a finding that Palm Beach's final policymakers were aware of Moore's actions, there is no evidentiary support to conclude that these final policymakers were aware of the purported motive behind the actions.[9] Moreover, assuming further that the final policyrnakers were aware of Moore's unconstitutional motive, no evidence was presented that could support a conclusion that those policymakers approved of this motive. Rather, based upon the record,

it is unclear whether the final policyrnakers approved of both the alleged unconstitutional actions and motive, or if the final policymakers adopted the actions for a different, and constitutional, motive. See id. ("A well-intentioned lawmaker who votes for the legislation-even when he votes in the knowledge that others are voting for it for an unconstitutional reason and even when his unconstitutionally motivated colleague influences his vote-does not automatically ratify or endorse the unconstitutional motive."). As such, based upon the evidence, the Court cannot find grounds to support municipal liability based upon the doctrine of ratification.[10]

B. Motion for New Trial

In the alternative, Palm Beach argues that if judgment as a matter of law is not granted in its favor, a new trial is warranted because the jury's verdict is against the great weight of the evidence. The Court agrees. The decision to grant a new trial because the verdict is against the great weight of the evidence is committed to the sound discretion of the district court. Fondren v. Allstate Ins. Co., 790 F.2d 1533, 1534 (llth Cir. 1986). As noted above, the Court found an insufficient legal basis to support the jury's verdict on the Section 1983 counts. Logically, therefore, this verdict must also be against the great weight of the evidence. However, even if the Court is incorrect in its decision on Palm Beach's Renewed Motion for Judgment as a Matter of Law, it nevertheless would grant Palm Beach's Motion for a New Trial on the ground that the jury's verdict was against the overwhelming weight of the evidence.

Specifically, the Court finds after weighing all the evidence that the Section 1983 municipal liability portion of the verdict was against the great weight of the evidence because: (1) Moore was not a final policyrnaker for Palm Beach county, and therefore his actions-even if unconstitutional-may not create municipal liability, (2) the County Board or Administrator did not delegated decision making authority to a lower-ranking official that deprived Plaintiffs of their constitutional rights, (3) the final policymakers of Palm Beach did not ratified any unconstitutional actions taken by lower level officials, and (4) the record is devoid evidence establishing unconstitutional actions, omissions, or motives that could be attributed Palm Beach for purposes of creating municipal liability. As such, after weighing all the evidence, the Court finds that a new trial would be warranted.

III. CONCLUSION

Accordingly, for the foregoing reasons, it is ORDERED AND ADJUDGED as follows:

1. Defendant Palm Beach County's Motion for Judgment Notwithstanding the Verdict [DE 152-11 is hereby GRANTED. The Court will enter an amended judgment as a matter of law reflecting the foregoing conclusions,

2. In the alternative, the Court would grant Defendant Palm Beach County's Motion for a New Trial [DE 152-2] if its decision to grant the Motion for Judgment Notwithstanding the Verdict is vacated or reversed.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this day of August, 2006.

Footnotes

[1]The Court notes that pursuant to Federal Rule of Civil Procedure 50(b) the proper name for the instant Motion is a Renewed Motion for Judgment as a Matter of Law.

[2]Federal Rule of Civil Procedure 50(c) requires a court, if the court grants a judgment as a matter of law, to "also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial." Cleveland v. Home Shopping Network Inc., 369 F.3d 1189, 1195-97 (11th Cir.), reh'g denied, 116 F. App'x 254 (11th Cir. 2004). Accordingly, if the renewed motion for judgment as a matter of law is granted, this Court must also rule on Palm Beach's motion for a new trial.

[3]Federal Rule of Civil Procedure 59(a) allows a district court to grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a)(1). Some of the primary bases for granting a new trial are that the jury's verdict is against the clear weight of evidence, that substantial errors occurred in the admission of jury instructions, the erroneous admission of evidence at trial, prejudicial misconduct of an attorney, and the when a witness makes a statement while testifying that is both improper and prejudicial.

[4] The Eleventh Circuit, in Bonner y. City of Prichard, 661 F.2d 1206, 1209 (11 th Cir. 1981) (en banc), adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[5] Courts impose liability for constitutional deprivations on governmental entities when: (1) an express policy or custom of the local governmental entity creates the constitutional deprivation, (2) final policymakers act with deliberate indifference to constitutional deprivations, (3) final policyrnakers delegate their authority to a subordinate, who causes a constitutional deprivation, or (4) final policymakers ratify a constitutionally impermissible decision or recommendation of a subordinate. Sherrod v. Palm Beach County Sch. Dist., 424 F. Supp. 2d 1341, 1344 (S.D. Fla. 2006); see also Lytle v. Dole, 326 F.3d 463, 471 (4th Cir. 2003).

[6]Plaintiffs do not argue that express terms of the ordinance are unconstitutional, or that the final policymakers acted with deliberate indifference to alleged constitutional deprivations. Rather, Plaintiffs contend that the implementation of that ordinance by Palm Beach and Moore was done in an unconstitutional manner.

[7] Additionally, the Court notes that the record does not contain sufficient evidence that the administrative review of Moore was defective, or that the review procedures-if the Plaintiffs sought to invoke then-would be less than meaningful.

[8]Even assuming arguendo that Moore was a final policymaker, Plaintiffs fail to justify how Palm Beach

may be held liable for constitutional deprivations when Moore-the purported final policymaker-was found not to have violated Plaintiffs' constitutional rights. While the Court notes that Palm Beach could be liable for the unconstitutional actions of other final policyrnakers, those with delegated power, or if final policymakers ratified a subordinate's unconstitutional actions, the crux of Plaintiffs argument-as well as the evidence-centered upon a theory that Moore, and those acting at his direction, deprived Plaintiffs of their procedural due process and equal protection rights. However, the jury found that Moore did not act in an unconstitutional manner. Therefore, based upon the evidentiary record it is difficult-if not impossible-to determine who's unconstitutional actions the jury imputed to Palm Beach when finding municipal liability on the Section 1983 counts.

Notably, in their Response to the instant Motion, the Plaintiffs maintain that Moore's actions create the basis for Palm Beach's liability on the Section 1983 counts. Specifically, the Plaintiffs contend that the jury held Moore liable in his official capacity but not liable in his individual capacity; thereby explaining how a verdict was reached against Palm Beach but not Moore. This argument is unpersuasive. On summary judgment the Court dismissed all counts alleged to the extent that they were asserted against Moore in his official capacity. Busby v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991) (holding that counts asserted against individuals in their official capacity are the functional equivalent of counts against the government entity). As such, the issue of whether Moore was liable in his official capacity was not before the jury when the verdict was rendered. Moreover, the Plaintiffs fail to offer, and the Court does

not find, precedent that supports the imposition of municipal liability when the purported individual wrongdoer was found not to have acted unconstitutionally. To impose liability under such circumstances would be create municipal liability when there is no evidence of unconstitutional actions that could be legally attributed to the municipality. As such, even if the record supported a finding that Moore was the final policymaker, there remains a legally insufficient evidentiary basis upon which a reasonable jury could impose liability upon Palm Beach.

[9] Plaintiffs argued during trial that one member of the County Board, Commissioner Roberts, approved of Moore's aggressive posture to certain moving companies. The Plaintiffs failed to provide sufficient evidence that Commissioner Roberts maintained such a position. However, even assuming that such evidence did exist, Commissioner Roberts' ratification alone is insufficient to create municipal liability. Matthews, 294 F.3d at 1297-98.

[10]The jury's determination that Moore did not act unconstitutionally further precludes a finding that Palm Beach's final policymakers ratified an unconstitutional action and motive. As discussed previously, the Plaintiffs' theorized that Moore, and those acting at his direction, caused constitutional deprivations. However, if Moore or those acting at his direction did not act unconstitutionally, then there exists no unconstitutional action or motive that could be ratified by Palm Beach's final policymakers that would create municipal liability under the ratification doctrine.

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No. 06-15394
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WHITE LION VAN LINES, INC., a Florida corporation, GREG FISCHER, Plaintiffs-Appellants,

versus

PALM BEACH COUNTY, FLORIDA, a charter county and political subdivision of the State of Florida, PALM BEACH COUNTY BOARD OF COMMISSIONERS, the governing body of the county, et al., Defendants-Appellees.

ORDER

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.